91-1376

Supreme Court, U.S.
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No. 91-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY INTERNATIONAL, *et al.*,

Petitioners,

—v.—

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding, contrary to the view of nine other circuit courts, that the asserted availability of post-judgment review is a sufficient ground to deny a petition for mandamus to review a district court's denial of a motion for recusal for the appearance of partiality, brought pursuant to 28 U.S.C. § 455(a)?

2. Whether the court of appeals' standard of review -- that even when "reasonable minds might draw different inferences from the facts" as to whether a district court's "impartiality might reasonably be questioned", a district court order denying recusal will not be overturned unless it is "clearly erroneous" -- is contrary to the law as established by this Court and the other courts of appeals?

3. Whether recusal of the district court judge was required under 28 U.S.C. § 455(a) in four cases involving Churches of the Scientology religion, where, *inter alia*, a *framed* copy of a recent *Time* magazine cover attacking the Scientology religion as a "cult of greed" hangs on the wall of the judge's chambers; where the *Time* cover article is an unrelenting, one-sided and scurrilous attack on Scientology and took an advocacy position against the Churches on issues central to the pending cases; and where the district judge and the special master had questioned the integrity of a court reporting service merely because the owner of the service, but not the court reporters, is a member of the Scientology religion?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.1 LIST

Petitioners in this Court and in the court of appeals are Church of Scientology International; Church of Scientology of California; Religious Technology Center; and Church of Spiritual Technology.

The United States District Court for the Central District of California is a Respondent in this Court and was the respondent below.

Vicki J. Aznaran; Richard N. Aznaran; United States of America; Sandra Baker; Baldemar Gomez; Charles Jeglikowski; Sherrill Fields; David Mayo; Advanced Ability Center; Robin Scott; Adrienne Scott; Ron Lawley; Morag Bellmaine; Steven Bisbey; Advanced Ability Center Candacraig; Advanced Ability Center East Grinstead; Church of the New Civilization; Harvey Haber; John Nelson; Jon Zegel; Vivian Zegel; Dede Reisdorf; and Richard Ofshe are respondents in this Court and were real parties in interest in the court below.

Petitioners have no parent companies, subsidiaries or affiliates to list pursuant to S.Ct. Rule 29.1.

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The Church of Scientology International ("CSI"), the Church of Spiritual Technology ("CST"), the Religious Technology Center ("RTC"), and the Church of Scientology of California ("CSC") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the court of appeals denying the Church's petition for a writ of mandamus (2a-3a) is unreported. The denial of the petition for rehearing and suggestion for rehearing en banc (1a) is unreported. The November 22, 1991, order of the district court denying the motions to recuse (4a) is unreported.[1/]

JURISDICTION

The order of the court of appeals was filed on December 4, 1991 (2a). The denial of the petition for rehearing was filed on January 30, 1992 (1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l); *see Schlagenhauf* v. *Holder*, 379 U.S. 104, 109 (1964).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 455(a) provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

28 U.S.C. § 1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

1/ The district court issued an oral decision at the hearing on the motions to recuse on October 25, 1991. The excerpts of the transcript of that hearing which contain the court's rulings are set forth at 5a-17a.

STATEMENT OF THE CASE

1. The Underlying Recusal Motions

Each petitioner is a Church of the Scientology religion. RTC is the entity charged with safeguarding the trademarks of the Scientology religion and with assuring that its religious services are provided in precisely the manner intended by its Founder, L. Ron Hubbard. CST is the archivist of the writings of Mr. Hubbard. CSI is the Mother Church of the Scientology religious hierarchy, and CSC is Scientology's former Mother Church.

These churches are litigants in one or more of four cases in the United States District Court for the Central District of California which have been assigned to the Honorable James M. Ideman. *See Vicki J. Aznaran, et al.* v. *Church of Scientology of California, et al.*, No. CV 88-1786 (JMI) (hereinafter "*Aznaran*"); *Religious Technology Center, et al.* v. *Scott, et al.*, No. CV 85-711 (JMI), and *Religious Technology Center, et al.* v. *Wollersheim, et al.*, No. CV-85-7197 (JMI) -- two separate actions that have been consolidated for all purposes (hereinafter "*Scott*"); and *Church of Scientology of California* v. *United States of America, Sandra Baker, et al.*, No. CV 90-2042 (JMI) ("*Baker*"). In September 1989, Judge Ideman appointed the Honorable James G. Kolts, a retired California Superior Court Judge, as Special Master in *Scott* to handle pretrial matters.[2/]

[2/] District court jurisdiction in *Aznaran* is premised upon diversity jurisdiction, 28 U.S.C. § 1332, in that plaintiffs are citizens of Texas and defendants are deemed citizens of California. *In Scott*, jurisdiction is premised on federal question jurisdiction, 28 U.S.C. § 1331, a federal copyright claim, 17 U.S.C. §§ 501, *et seq.*, and the doctrine of pendent jurisdiction. In *Baker*, jurisdiction is premised upon 28 U.S.C. § 1331, and because the United States of America is a party defendant, upon 28 U.S.C. § 1346. *See* Sup.Ct. Rule 14.1(i).

In each of these cases, sensitive issues concerning the Scientology religion are raised. In *Aznaran*, the plaintiffs rest their multi-million dollar claim for "intentional infliction of emotional distress" arising out of their voluntary participation in Scientology on the theory that Scientology is not a religion and therefore is not entitled to the protection of the religion clauses of the First Amendment. Indeed, there is currently pending before Judge Ideman the Churches' dispositive summary judgment motion seeking dismissal of the action pursuant to the First Amendment. The motion also seeks partial summary judgment that Scientology is a religion within the meaning of the First Amendment. In *Scott*, one of the defendants raised the spurious claim that he, rather than L. Ron Hubbard, authored some of Scientology's sacred scriptures. In *Baker*, CSC asserts claims arising from violations of its First Amendment rights as a religious entity.

Petitioners moved to disqualify Judge Ideman in these four cases, and to disqualify Special Master Kolts in *Scott,* on the following grounds, which, petitioners contended, give rise to an appearance of partiality pursuant to 28 U.S.C. § 455(a):

1) A framed cover of the May 6, 1991, edition of *Time* magazine, which characterizes the Scientology faith as a "Cult of Greed", hangs on the wall of Judge Ideman's chambers area;

2) Judge Ideman and the Special Master in *Scott* questioned the integrity of a court reporting service and the veracity of two transcripts solely because the owners of the service (but not the relevant reporters) are members of the Scientology religion;

3) Judge Ideman has had a personal and professional relationship with one of the key defendants in *Baker*;

4) Judge Ideman falsely accused the Church and its counsel of blatant disregard of his orders in *Aznaran*.

a. The *Time* Magazine Cover

On October 5, 1991, petitioners learned from a law student, who had been invited into Judge Ideman's chambers area by court personnel, that a *framed* copy of the cover of the May 6, 1991, issue of *Time* magazine hangs on the wall of Judge Ideman's and his staff's workspace.[3/] That cover portrays a tentacled volcano from which explodes the headline *"Scientology: The Cult of Greed."* Emblazoned on the volcano is the subtitle, "How the Growing Dianetics Empire Squeezes Millions from Believers Worldwide."[4/] The *Time* magazine cover is an offensive parody of the cover of L. Ron Hubbard's *Dianetics: Modern Science of Mental Health*, Scientology's first and best-known scripture. *Dianetics* covers, since the late 1960's, have featured an exploding volcano.

The eight page cover article contained in that issue of *Time* was written by an author who previously had published scurrilous attacks upon Scientology, and who, as set forth in the Churches' pleadings and exhibits in the district court, has acted in concert with groups and individuals who advocate and engage in the process of "deprogramming" adults into abandoning their religious or other associations with groups as

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[3/] During an employment interview with Bowles & Moxon, counsel of record for certain petitioners in each of the four cases, the law student explained that in the course of her current law clerk position with the City Attorney of Los Angeles, she delivered a brief to Judge Ideman's law clerk in September 1991, at which time she had been invited to step back into the staff area of Judge Ideman's chambers. There, she saw a framed copy of the May 6, 1991, cover of *Time* magazine hanging on the wall.

[4/] The cover was submitted as an exhibit to the recusal motions in the district court. It is reproduced in color as an appendix annexed to this petition.

diverse as the Pentecostal, Catholic and Scientology religions.[5/] The *Time* article is a relentless one-sided attack upon the Scientology religion, its leadership, its parishioners, and its lawyers. It is inflammatory in tone, accusatory in style, and dependent exclusively upon sources hostile to Scientology. It has been characterized by spokesmen for the National Council of Churches and the American Conference on Religious Movements as a "hatchet job" and a "new low" for American journalism, as set forth in the record below. Even putting aside the issue of the falsehoods and omissions in the article, no objective person could view the cover and the accompanying article as anything other than an extraordinarily critical attack on Scientology.

Perhaps the most disturbing aspect of the fact that the *Time* magazine cover hangs in Judge Ideman's chambers is that the article explicitly advocates in support of the positions taken by the Aznarans in their lawsuit pending before Judge Ideman.[6/] It favorably and uncritically quotes lurid unsub-

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[5/] "Deprogramming" is a term for acts which often involve forcibly seizing and holding an individual against his will and subjecting him to hours or days of indoctrination. For a description of "deprogramming", see *Colombrito v. Kelly*, 764 F.2d 122 (2d Cir. 1985), holding that such conduct is actionable under 42 U.S.C. § 1985(3).

[6/] It should be noted that in the *Aznaran* case, the plaintiffs actually submitted the *Time* cover to the district court in opposition to the Churches' motion for summary judgment. In reply, the Churches objected to the admissibility of such rank, false hearsay, but also submitted extensive rebuttals of *Time's* attack in an effort to prevent the court from being prejudiced by the article. To petitioners' knowledge, none of the Churches' materials were framed and hung on the walls of Judge Ideman's chambers.

stantiated accusations by both Aznarans,[7] but fails to mention their multi-million dollar lawsuit. And it repeatedly suggests -- despite the holdings to the contrary of numerous courts[8] -- that Scientology is not a *bona fide* religion, and is not entitled to the protection of the religion clauses of the First Amendment.[9]

Finally, it bears some emphasis that the framed cover was hung in a place not restricted solely to court personnel.

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[7] Ms. Aznaran is quoted as follows: "This is a criminal organization, day in and day out. It makes Jim and Tammy [Bakker] look like kindergarten." *Time* at 51; *see also id.* at 57. The article fails to mention Ms. Aznaran's concession in her own deposition that one of the reasons she was removed from her position as President of defendant RTC was for her support for individuals who had been removed from positions of authority for their involvement in wrongful secular conduct.

[8] In *Hernandez v. Commissioner,* 490 U.S. 680, 684-85(1989), this Court described Scientology beliefs and practices in clearly religious terms. The cases recognizing and holding that Scientology is a religion are numerous, including *Founding Church of Scientology* v. *United States,* 409 F.2d 1146 (D.C. Cir.), *cert. denied,* 396 U.S. 963 (1969); *Church of Scientology of California* v. *C.I.R.,* 823 F.2d 1310 (9th Cir. 1987), *cert. denied,* 486 U.S. 1015 (1988); *Christofferson* v. *Church of Scientology of Portland,* 57 Or.App. 203, 644 P.2d 577 (1982), *cert. denied,* 459 U.S. 1206 (1983); *Church of Scientology Flag Services Org.* v. *City of Clearwater,* 756 F.Supp. 1498 (M.D. Fla. 1991); *Barr* v. *Weise,* 412 F.2d 338 (2d Cir. 1969).

[9] Thus, *Time* asserts, *inter alia*, "The big business of Scientology has shielded itself exquisitely behind the First Amendment." The article suggests that when the Food and Drug Administration unsuccessfully attempted to prohibit Scientology from distributing its literature and religious artifacts in the late 1960's, "Hubbard responded by going fully religious, seeking First Amendment protection for Scientology's strange rites." *Id.* at 51. The article omits that the court of appeals held that Scientology indeed was a religion *at the time* of the FDA's actions. *See Founding Church, supra,* 409 F.2d at 1160.

The framing and hanging in the judge's chambers of a magazine cover attacking a party involved in no less than four cases before that judge necessarily requires a certain degree of conscious intention. By doing so in a quasi-public place, Judge Ideman invited the public reasonably to conclude he had formed certain judgments concerning that party. It is not surprising that the Churches have perceived the public display of the *Time* article as the equivalent of a display of Klan literature by a judge sitting in a case alleging racial discrimination.

b. The Attack on the Integrity of the Court Reporting Service

In the *Scott* cases, petitioners RTC, CSI, and CSC are plaintiffs, in which they seek relief against multiple defendants for the theft of confidential religious scriptures. Those three Churches and CST are also counterdefendants. The *Scott* cases, after nearly five years of litigation, were transferred from the Honorable Mariana R. Pfaelzer to Judge Ideman in 1989, who then appointed Judge Kolts as Special Master in September 1989.

On August 21, 1991, Jerold Fagelbaum, counsel for some of the *Scott* defendants, wrote to Sheila Atkinson-Baker, the owner of Atkinson-Baker & Associates, Inc., a certified shorthand reporting firm, alleging delays in his receipt of two transcripts and expressing "displeasure" at Atkinson-Baker's "performance" in the case.[10/] Fagelbaum's letter, which was sent to Judge Ideman, included an *ad hominem* attack upon Ms. Atkinson-Baker, based upon her religious affiliation. Noting that both Ms. Atkinson-Baker and her husband are Scientologists and that he believed they had made financial contributions to their religion, Fagelbaum made the false and wholly unsubstantiated accusation that "serious doubt" had

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[10/] The uncontroverted evidence in the record below shows that the delays were minor and inadvertent.

been raised about the veracity of the verifications signed at the end of each of the two transcripts (despite the fact that neither reporter is a Scientologist) and that Ms. Atkinson-Baker's "objectivity and independence have been thoroughly overshadowed." Fagelbaum further asserted, "Not only are you Scientologists *which, by itself, eliminates your independence in this case*, but also, you have a financial interest in the prosecution of this litigation itself." (Emphasis added).

At a September 19, 1991, hearing on an unrelated matter in *Scott,* Special Master Kolts told the parties that Judge Ideman had called him after receiving Fagelbaum's letter, that "this is the only time he's called me in these entire proceedings," Sept. 19, 1991, Reporter's Transcript, at 4, that Judge Ideman "was obviously upset", *id.,* and that he "was concerned about the allegations," *id.* at 64. According to Judge Kolts, Judge Ideman stated that the matter "should require some looking into." *Id.* at 6. The Special Master stated that he had reassured Judge Ideman that the only problem with the transcripts had related to delay, and that it had been resolved because matters had proceeded in any event. *Id.* The Special Master refused counsel's request to be more specific as to the concerns raised by Judge Ideman. *Id.* at 6, 64-65.

Notwithstanding his statement that delay was the only problem, the Special Master then admonished the Church's counsel, stating "that it was an extremely unwise choice of action to permit it to go on, because *I think the transcript of any proceedings that these people reported* is certainly open to some question." *Id.* at 4-5 (emphasis added). Thus, in response to Judge Ideman's prompting, and without a shred of evidence in support, the Special Master adopted Mr. Fagelbaum's position that the accuracy of any transcript reported by a non-Scientologist who is employed by a company owned by members of the Scientology religion could not be trusted. The Special Master also told the Church's counsel,

"I advised you that I felt that . . . [use of the Atkinson-Baker service] would always leave the potential . . . for someone to claim that there was something wrong with that transcript." *Id.* at 65. When one of the Church's attorneys questioned "why the contents of the transcript would be at all suspect simply by virtue of the fact that a Scientologist is involved in the company," *id.* at 5, the Special Master responded that "it was an unfortunate situation that need not have occurred." *Id.* at 6. When the attorney pointed out that Atkinson-Baker hires its reporters without regard to their religion, the Special Master responded that the practice of using reporters hired by Atkinson-Baker "was an ill-advised way to go." *Id.* at 65.

c. Judge Ideman's Relationship With One of the Defendants in the *Baker* Case

In the *Baker* case, defendants include agents and representatives of the Internal Revenue Service and the United States of America. One of these defendants, IRS attorney Charles Jeglikowski, acknowledged in deposition that he had a personal and professional relationship with Judge Ideman. Mr. Jeglikowski testified that from approximately 1973 to 1976, both he and Judge Ideman were posted in the 78th Military Law Center in San Pedro, California in the same or sister units of the Judge Advocate General Corps in the U.S. Army, during which they enjoyed a "cordial" relationship. The Jeglikowskis and the Idemans also attended "one or two" social functions together.

In the *Baker* case, which will be tried without a jury, Judge Ideman will be required to adjudicate whether or not his friend and former colleague has been culpable of serious alleged misconduct and is liable for damages. Mr. Jeglikowski chairs the monthly IRS meetings held in Pasadena for the planning and execution of actions for which CSC seeks redress on the ground that they are unlawful and unconstitutional. Judge Ideman will also be required to make determi-

nations as to the credibility of the testimony of Mr. Jeglikowski and the subjective intent of Mr. Jeglikowski concerning conduct which is susceptible to differing interpretations by the finder of fact. For example, violation of CSC's First Amendment rights arising out of the religious animus of Mr. Jeglikowski, among others, is at issue.

d. Judge Ideman Falsely Accused Petitioners and Their Counsel of Blatant Disregard of his Orders in the *Aznaran* Case.

On August 30, 1991, after petitioners had protested the chronic violations of court orders, the local rules, and other procedural obligations by the Aznarans' counsel,[11/] Judge Ideman entered an order, which states in pertinent part:

> The court has not been favorably impressed with either counsel's lack of compliance with either its orders or the local rules throughout the pendency of this action. Because *both* parties' counsel have felt free to repeatedly act *in blatant disregard of this Court's Orders* and more importantly, in light of the fact that this Court seeks to reach an adjudication on the merits of all remaining pending motions, rather than becoming mired in adjudicating which side in this litigation is more often in violation of the rules of this Court, the Court ACCEPTS all submissions to date. . . . .
>
> In light of the flagrant misconduct of both sides in this action, all pending requests for sanctions are hereby DENIED. Counsel is [sic] put on notice however that should they continue to engage in

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11/ The chronology of events pertaining to the Aznarans' disregard of the orders of the court and the local rules appears in the Petition for Writ of Mandamus, at 16-22.

> outrageous litigation tactics, the Court will not hesitate to use its sanctioning power.

(Emphasis added). The events leading up to that order, however, demonstrate that the Aznarans and their counsel *alone* engaged in "blatant disregard" for the rules and orders of the court, a fact that the district court judge to whom the recusal motions were referred determined to be "largely undisputed" (13a). Furthermore, the Order and the record make clear that Judge Ideman's assertion of "flagrant misconduct" and "outrageous litigation tactics" refer directly to his finding of "blatant disregard" of his orders, and not to some other unspecified activities.

2. The District Court's Order Denying Recusal

Pursuant to the local rules of the Central District of California, the recusal motions in the four cases, brought pursuant to 28 U.S.C. § 455(a), were referred to the Honorable J. Spencer Letts. *See* District Court General Order 224, § 5.0. Judge Letts then convened a hearing on the motions, which is held only if the court finds that a recusal motion is "timely and legally sufficient." *Id.* Nevertheless, at the hearing on October 25, 1991, Judge Letts denied the recusal motions from the bench (5a-17a). The court based its reasoning on a standard wholly irrelevant to a section 455(a) recusal motion: "[I]s the objective reason that you've asserted for believing that [the judge] has some bias sufficient to support a conclusion that he does[?]" (12a).

First, the court accepted as true and undisputed that the framed cover of *Time* magazine did hang in Judge Ideman's chambers (9a). The court, however, held that this fact was irrelevant and that it would therefore not consider it as a ground for recusal (10a, 15a-16a). Again relying on a subjective standard irrelevant to 28 U.S.C. § 455(a), the court repeatedly stated, "I still don't think you can draw any inference from that fact [the framed *Time* cover hanging in

Judge Ideman's chambers] as to Judge Ideman's state of mind or the state of mind of anyone in his chambers." 16a; *see also* 8a-11a, 15a. The court refused to consider or even to permit argument on the inferences that would be drawn by an objective reasonable person.

Second, the court rejected the arguments concerning Judge Ideman's and Special Master Kolt's reactions to the use of a court reporting company owned by Scientologists because "I cannot conclude that the evidence is a pre-existing bias or any other bias that arises from outside the proceeding" (14a). Judge Letts also stated that he did not "disagree with th[e] conclusion" of Judge Ideman that the fact that the owners of the court reporting service were Scientologists "did require looking into." *Id.*

Third, the court rejected the argument concerning defendant Jeglokowski's relationship with Judge Ideman, although its reasoning is somewhat opaque:

> I must say, I'm not awfully persuaded by the government's argument in that case, but since the Scientology position is basically a mirror of the other two positions, without the other two, this one must fall, and I'm not persuaded by the other ones, so I would deny the motion to recuse in that case. *Id.*

Fourth, Judge Letts found that it is "largely undisputed" that "the blatant disregard of [Judge Ideman's] order was not attributable to" the Church (13a). Nevertheless, without any explanation or evidence, Judge Letts speculated that Judge Ideman's reference to "outrageous litigation tactics and/or flagrant misconduct, *id.*, may have involved some other unknown, unspecified actions unrelated to the "blatant disregard of the Court's order." *Id.* He concluded, "I cannot say that it is possible, based on the record before me, to conclude that his statements that both parties had engaged in flagrant misconduct, blatant disregard or outrageous litigation

tactics represent a pre-existing bias that didn't result from the judicial process. I would deny the motion in that case."*Id.*

On November 22, 1991, the district court issued a written order summarily denying the recusal motions (4a).

3. The Court Of Appeals' Decision

On November 1, 1991, the Church filed a petition for mandamus in the Ninth Circuit. The petition was denied on December 4, 1991, in an order that stated in its entirety:

> While reasonable minds might draw different inferences from the facts alleged in the motion for recusal, the court finds that the district court's order denying recusal was not clearly erroneous, and further that the harm alleged in the petition is correctable on appeal. *See Bauman v. United States Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977); *In re Cement Antitrust Litigation (MDL 296)*, 699 [sic] F.2d 1297, 1302 (9th Cir. 1982). Accordingly, the petition for writ of mandamus is denied. The motion to stay is denied as moot.

2a-3a.[12/] The court below denied the petition for rehearing and the suggestion for rehearing *en banc* on January 31, 1992 (1a).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE AVAILABILITY OF MANDAMUS REVIEW OF A DENIAL OF A MOTION FOR RECUSAL PURSUANT TO 28 U.S.C. § 455(a).

At least since *La Buy* v. *Howes Leather Co., Inc.*, 352 U.S. 249 (1957), the courts of appeals have been authorized and directed to use their mandamus jurisdiction under the All

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12/ The court below miscited *In re Cement Antitrust Litigation*. The correct citation is 688 F.2d 1297.

Writs Act, 28 U.S.C. § 1651(a), to exercise "supervisory control" over the district courts when it is "necessary to proper judicial administration in the federal system." *La Buy*, 352 U.S. at 259-60; *see Schlagenhauf* v. *Holder*, 379 U.S. 104, 109-10 (1964). As this Court has recently reiterated, "we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction'", *Mallard* v. *United States District Court*, 490 U.S. 296, 309 (internal quotations omitted); rather, mandamus is proper when the district court has engaged in a "clear abuse of discretion" or "conduct amounting to usurpation of [the judicial] power." *Id.* (internal quotations omitted).

The refusal of a judge to recuse himself when "his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), constitutes just such a clear abuse of discretion and conduct amounting to a usurpation of judicial power. Nothing is more fundamental to the proper functioning of the federal judicial system and due process than a neutral and impartial judge. This interest is so important that actual bias or partiality is not necessary to require a judge's recusal. "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988) (citing S. Rep. No. 93-419, at 5; H.R. Rep. No. 93-1453, at 5); *See, e.g., Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 825 (1986); *In re Murchison*, 349 U.S. 133, 136 (1955); *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927).

The most effective, meaningful way to prevent the damage to the judicial system and to the litigants that arises when a district court improperly denies a recusal motion is to permit immediate plenary review by way of a petition for a writ of mandamus. For this reason, *every* court to consider the issue, *except* the Ninth Circuit, has held that mandamus is available to correct an improper refusal to recuse under

section 455(a). Nevertheless, the nine courts of appeals outside the Ninth Circuit that permit mandamus review of this issue apply at least three different procedural or substantive rules on mandamus review. Because the issues of judicial impartiality in fact and the public appearance of such impartiality are so important to proper respect for and the functioning of the federal courts, this Court's review is essential to resolve the conflict between the Ninth Circuit and nine other courts of appeals and to insure uniform substantive and procedural appellate review of district court denials of recusal motions pursuant to section 455(a).

Only the Ninth Circuit now takes the view that the theoretical availability of post-judgment appeal from a denial of a motion to recuse under section 455(a) is a sufficient ground to deny a petition for mandamus. *See* 3a. The reliance of the court below on *Cement Antitrust, supra*, makes clear that it denied the petition primarily, if not exclusively, on the ground that mandamus review is unavailable in this situation.[13/] In *Cement Antitrust,* the Ninth Circuit held that the *grant* of a motion to recuse could be reviewed by mandamus, because "the error, if any, cannot serve as a basis for reversal on appeal." 688 F.2d at 1302. The court held, however, that "an order *denying* a motion for disqualification is reviewable on appeal after final judgment," *id.* (emphasis original), which, according to the Ninth Circuit, would "render the exercise of our mandamus authority inappropriate." *Id.*

[13/] Petitioners recognize that the order of the court below also can be read as purporting to address the merits of the petition, but the standard applied -- "[w]hile reasonable minds might draw different inferences from the facts alleged in the motion for recusal, the court finds that the district court's order denying recusal was not clearly erroneous" (2a-3a) -- is such a watered-down (and incorrect) reformulation of § 455(a) as to render meaningless any review by mandamus in the Ninth Circuit. *See* Point II, *infra*.

The court below, in rejecting the petition because "the harm alleged . . . is correctable on appeal" (3a), adhered to the Ninth Circuit's view in *Cement Antitrust* that mandamus review is improper.

The Ninth Circuit's position has been universally rejected, although, as noted, the courts of appeals take at least three different approaches to mandamus review of denials to recuse pursuant to section 455(a). The First, Second, and apparently the Fourth Circuits consider denials of recusal motions both by mandamus petitions and on post-judgment appeals, but they require a heightened showing before the mandamus petition will be granted. *See, e.g., In re United States*, 666 F.2d 690, 694-95 (1st Cir. 1981) ("party seeking the writ of mandamus must show a clear and indisputable right to relief") (internal quotations omitted);[14/] *United States* v. *Chantal*, 902 F.2d 1018, 1021-22 (1st Cir. 1990) (review upon appeal from final judgment after entry of guilty plea; no requirement of "clear and indisputable" right to relief); *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312-13 (2d Cir. 1988) (on petition for mandamus, petitioner must clearly and indisputably demonstrate that the district court abused its discretion), *cert. denied*, 490 U.S. 1102 (1989); *id.* at 1314 (explicitly distinguishing standard of review on mandamus from that on direct appeal); *United States* v. *Coven*, 662 F.2d 162, 167-68 (2d Cir. 1981) (post-judgment review of a denial of a motion to recuse), *cert. denied*, 456 U.S. 916 (1982). The clear import of these decisions, particularly *Drexel Burnham*, is that a denial of the mandamus petition does not preclude a direct appeal after final judgment on the recusal issue. *See* 861 F.2d at 1314.

[14/] In *In re United States, supra*, the United States sought mandamus to obtain review of a denial of a § 455(a) recusal motion. *See also Bell* v. *Chandler*, 569 F.2d 556 (10th Cir. 1978).

The decisions of the Fourth Circuit, which permit both mandamus and post-judgment appeal, are unclear whether the court applies a more stringent substantive standard on mandamus review than on direct appeal. *See In re Beard*, 811 F.2d 818, 826-27 (4th Cir. 1987) (discussing in general the heightened showing necessary for granting a mandamus petition, but then apparently not applying that heightened standard in its mandamus review of a denial of a recusal motion); *United States* v. *Mitchell*, 886 F.2d 667, 671 (4th Cir. 1989) (post-conviction review of denial of recusal motion).

A second, "majority" approach, followed in the Third, Fifth, Eighth, Tenth, and apparently the Sixth Circuits, is to review denials of motions to recuse pursuant to section 455(a) either by mandamus or by direct appeal after final judgment, and to apply identical substantive standards in determining whether recusal is required, whether by mandamus or on direct appeal.[15/] *See, e.g.*, *Moody* v. *Simmons*, 858 F.2d 137, 143 (3d Cir. 1988) ("A judge who was obliged to recuse acts outside his jurisdiction"; petition for mandamus lies), *cert. denied*, 489 U.S. 1078 (1989); *Edelstein* v. *Wilentz*, 812 F.2d 128, 131 (3d Cir. 1987) (reviewing denial of recusal motion upon direct appeal of final judgment); *In re Faulkner*, 856 F.2d 716, 720-21 (5th Cir. 1988) (granting petition for a writ of mandamus); *In re Continental*, 901 F.2d 1259, 1262-63 (5th Cir. 1990) (review upon direct appeal from final judgment);[16/] *Liddell* v. *Bd. of Educ. of City of St. Louis*,

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[15/] Obviously, in these circuits, a party could not obtain substantive review by mandamus *and* on direct appeal, since failure on the merits of the recusal issue on mandamus would preclude further identical substantive review, absent new evidence of the appearance of partiality.

[16/] The Eleventh Circuit has reviewed denials of recusal motions on appeal from a final judgment, *see McWhorter* v. *City of Birmingham*, (continued...)

677 F.2d 626, 643 (8th Cir.) (denial of motion to recuse "is reviewable by a petition for a writ of mandamus"), *cert. denied*, 459 U.S. 877 (1982); *Perkins* v. *Spivey*, 911 F.2d 22, 33 (8th Cir. 1990) (review of denial of motion to recuse on direct appeal); *Bell* v. *Chandler*, 569 F.2d 556, 559 (10th Cir. 1978) ("There is no question but that a mandamus petition may be used to force the disqualification of a district court judge"); *Franks* v. *Nimmo*, 796 F.2d 1230, 1235 (10th Cir. 1986) (review of denial of recusal motion on direct appeal).

The Sixth Circuit, in a recent *en banc* decision, conformed its position with the dominant view "that we can and should consider a petition for mandamus following a district court's denial of a motion to disqualify" pursuant to section 455(a). *In re Aetna Casualty & Surety Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990). As that court did not hold that review of a denial of a motion to recuse *must* be brought by immediate mandamus petition, presumably it will continue to entertain post-judgment appeals on this issue. *See, e.g., Schultz* v. *Newsweek, Inc.*, 668 F.2d 911, 919-20 (6th Cir. 1982). In reviewing the merits of the mandamus petition in *Aetna*, the Sixth Circuit applied the same substantive standards as it has applied in post-judgment appeals. 919 F.2d at 1143.

The Seventh Circuit follows a third path, holding "that when a judge denies a motion to disqualify himself under § 455(a), the moving party's *sole recourse* is to apply to this

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[16/] (...continued)

906 F.2d 674, 678 (11th Cir. 1990), but it has apparently not yet considered whether mandamus review is available. Presumably, it would agree with the Fifth Circuit that mandamus is available. *See In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 961 n.4 (5th Cir.) (recognizing "authority to review on mandamus the question of disqualification"), *cert. denied*, 449 U.S. 888 (1980); *Bonner* v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*) (adopting prior decisions of the Fifth Circuit).

court immediately for a writ of mandamus." *United States* v. *Balistrieri*, 779 F.2d 1191, 1205 (7th Cir. 1985) (emphasis added), *cert. denied*, 475 U.S. 1095 (1986); *see Union Carbide Corp.* v. *U.S. Cutting Service, Inc.*, 782 F.2d 710, 713 (7th Cir. 1986); *Taylor* v. *O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989). The Seventh Circuit will refuse to consider section 455(a) recusal issues on direct appeal from a final judgment. *See Balistrieri*, 779 F.2d at 1205; *O'Grady*, 888 F.2d at 1201.[17/]

The Seventh Circuit provides two related reasons for its position. First:

> if a judge proceeds in a case when there is (only) an appearance of impropriety in his doing so, the injury is to the judicial system as a whole and not to the substantial rights of the parties. The parties in fact receive a fair trial, even though a reasonable member of the public might be in doubt about its fairness, because of the misleading appearances.

Balistrieri, 779 F.2d at 1204-05. The second rationale is:

> that of preventing injury to the public perception of the judicial system before it has a chance to occur. If a party is deprived of his substantial rights in a trial before an actually biased judge, the harm can be remedied (though not costlessly) by a new trial before an unbiased judge. But the harm to the public's perception of the judicial system when a judge who appears to be biased proceeds in a case is more difficult to correct. *Prevention in such circumstances is clearly preferable to attempts to cure.*

[17/] In ironic contrast to the Ninth Circuit, which only reviews *grants* of recusal motions on mandamus petitions, *Cement Antitrust*, 688 F.2d 1302, the Seventh Circuit has held that it has *no* jurisdiction to review a *grant* of a motion to recuse because "[l]itigants have no protectable interest in having their case heard by one judge rather than another." *Balistrieri*, 779 F.2d at 1205 n.14.

Id. at 1205 (emphasis added); *see also Union Carbide*, 782 F.2d at 712-13. In its substantive review, the Seventh Circuit applies a standard similar to that adopted by this Court in *Liljeberg, supra*, and it does not require a heightened showing before the mandamus petition may be granted. *See Durham* v. *Neapolitan*, 875 F.2d 91, 97 (7th Cir. 1989).

No method of appellate review of a denial of a motion to recuse under section 455(a) is costless. The question, in light of the disarray among the circuits, is which approach best effectuates the purpose of section 455(a) of protecting the integrity of the federal court system from even the appearance of partiality, best conforms to the proper usages of mandamus review, and uses judicial resources most efficiently.

Petitioners respectfully submit that the universally-rejected position of the Ninth Circuit that mandamus review of a denial to recuse is unavailable fails on each of these counts. First, as noted, the usurpation of judicial power inherent in the refusal of a judge to recuse himself when "his impartiality might reasonably be questioned" is particularly appropriate for mandamus relief. Second, because the harm is to the public perception of the fairness of the judicial system as much as to the parties, the issue should be resolved at the earliest possible opportunity. *See Balistrieri*, 779 F.2d at 1204-05; *In re United States*, 666 F.2d at 694. Indeed, it may well be impossible to remedy the harm to the public perception of the impartiality of the federal judiciary upon post-judgment appeal. *See Balistrieri*, 779 F.2d at 1205. Finally, the obvious waste in judicial resources in the Ninth Circuit's approach is highlighted by *Preston* v. *United States*, 923 F.2d 731 (9th Cir. 1991), in which the Ninth Circuit, in reversing a denial of a motion to recuse, stated, "We recognize that this case has been tried once to judgment and that a retrial will involve considerable additional expense, perhaps with the same result as the first trial. This is unfortunate." *Id.* at 735.

Clearly, proper judicial administration and the preservation of the appearance of justice would have been better served had the issue been raised and resolved before trial upon a petition for a writ of mandamus.

The approach of the First and Second Circuits, in which mandamus petitions are considered, but which impose extremely stringent standards for relief, defeats the purpose of section 455(a) and leads to a waste of judicial resources. The creation of the legalistic requirement that the district court "clearly and indisputably . . abused its discretion," *Drexel Burnham*, 861 F.2d at 1312-13, hardly serves to eliminate a public perception that a judge's impartiality might reasonably be questioned. As this Court stated in *Liljeberg*,

> People who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.

486 U.S. at 865 (footnote omitted); *see Drexel Burnham*, 861 F.2d at 1320 (Lumbard, J., dissenting). Moreover, by requiring a greater showing to obtain mandamus relief, the court necessarily invites a post-judgment appeal on this issue. The result is both a waste of judicial resources in permitting litigants two "bites at the apple", and a tremendous embarrassment to the judicial system if the relief is ultimately granted after the same court initially denied the relief on the ground that, although reasonable people might question the judge's impartiality, the issue was not so "clear and indisputable" as to grant recusal by way of mandamus. If mandamus review is to be had, the substantive standard for recusal should be no greater than that applied by this Court in *Liljeberg*. In other words, if the court of appeals concludes that a judge's impar-

tiality might "reasonably be questioned," then the right to relief under § 455(a) is clear and indisputable.[18/]

The Seventh Circuit's requirement that relief must be by mandamus necessarily forces litigants to file petitions even though they may ultimately settle the case or prevail on the merits. That court, however, has not found its approach to be unduly burdensome, and it has noted that petitions will be denied in "routine" cases "with sanctions, if the petition for mandamus is frivolous." *Union Carbide, supra,* 782 F.2d at 712. Moreover, no opposition to a mandamus petition may be filed unless the court so requests, Fed.R.App.P. 21(b), which helps conserve judicial resources for the most serious petitions.

The Seventh Circuit may also be overstating the case somewhat when it asserts that the *only* harm pursuant to an improper denial of a recusal motion under section 455(a) is to the public perception of the judiciary and not to the parties and, therefore, post-judgment relief is unavailable because it cannot remedy the harm to the public's perception. A *party's* perception that it received a fair trial before an impartial judge is also an important consideration. Thus, a party may well be entitled to post-judgment relief if the judge's impartiality in the case might reasonably be questioned. Nevertheless, the Seventh Circuit is clearly correct that it is far better to remedy the recusal issue immediately and that review on

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[18/] Assuming that the court below did consider the merits, the Ninth Circuit's requirement that the district court's decision cannot be disturbed unless it is "clearly erroneous" (3a) raises the same problems as the standard applied in the First and Second Circuits. Indeed, the court below not only explicitly invited post-judgment appeal on this issue, *id.*, but, by finding that "reasonable minds might" differ on the facts (2a), it has virtually invited an appellate finding that recusal is required after what promises to be three lengthy, complex trials. *See* Point II, *infra.*

mandamus does not require heightened scrutiny of the substantive issue. Its rule also has the advantage of certainty.[19/]

The majority approach appears to best satisfy the various concerns at stake. Mandamus review is available to remedy immediately the harm to the public's perception of the integrity of the judiciary, but neither the parties nor the courts are forced to engage in mandamus review to preserve the recusal issue. Moreover, a mandamus petitioner receives full substantive review pursuant to section 455(a), and thus would be unable to relitigate the issue after final judgment.

While the majority rule permits a party to raise the issue of a denial of a recusal motion on post-judgment appeal, that fact should not preclude mandamus review under the decisions of this Court. This is so because the most significant harm caused by an improper denial of a recusal motion under section 455(a) is to the public's perception of the appearance of judicial impartiality and fairness in the administration of the federal judicial system, a harm which cannot be fully protected by the right of an aggrieved party to appeal after losing in the district court. Indeed, no remedy may exist because the aggrieved party may ultimately prevail in the district court or, fearing an apparently biased judge, be forced into settlement, results which may not alleviate the public's perception of partiality. Thus, the denial of a recusal motion under section 455(a) presents a classic case for the use of supervisory mandamus, such as in *La Buy, supra,* or *Schlagenhauf, supra,*

19/ *Liljeberg, supra,* which has thus far been this Court's only substantive consideration of section 455(a), arose in the unusual context in which the appearance of partiality was discovered only after final judgment was entered. 486 U.S. at 850. In such cases, post-judgment review is the only available recourse.

in which mandamus was permitted despite the theoretical ability of an aggrieved party to raise the issue on appeal.

Whether this Court ultimately determines that the Seventh Circuit's approach or the majority approach best preserves the public perception of the impartiality of the federal judiciary, this Court's review is necessary to make clear that the Ninth Circuit's approach is incorrect and that a uniform rule is necessary to help "promote public confidence in the integrity of the judicial process." *Liljeberg,* 486 US. at 860.

II. ASSUMING THE COURT BELOW ENGAGED IN SUBSTANTIVE REVIEW, THE STANDARD IT APPLIED IS INCONSISTENT WITH DECISIONS OF THIS COURT AND OF EVERY OTHER CIRCUIT AND UNDERMINES THE PURPOSE OF § 455(a)

Assuming the court below did reach the merits of the petition, the unique standard it claimed to have applied so dilutes section 455(a) as to render recusal pursuant to mandamus meaningless in the Ninth Circuit. Moreover, the standard is inconsistent with decisions of this Court and every other court to consider the question. As this Court has stated, "If [a judge] concludes that his 'impartiality might reasonably be questioned,' then he should also find that the statute has been violated." *Liljeberg*, 486 U.S. at 861. The courts are in universal agreement that the standard to be applied is an objective one, based on the perceptions of a reasonable lay member of the public. *See id.* at 860-61; *Preston, supra,* 923 F.2d at 734; *Chantal, supra,* 902 F.2d at 1022-24; *In re Continental, supra,* 901 F.2d at 1262 (5th Cir. 1990); *Parker v. Connors Steel*, 855 F.2d 1510, 1524 (11th Cir. 1988), *cert. denied,* 490 U.S. 1066 (1989).

The court below stated that even when "reasonable minds might draw different inferences from the facts," a district court order denying recusal will not be overturned unless it is "clearly erroneous" (2a-3a). The court's finding that "*reason-*

able minds might draw different inferences," however, effectively parallels the statutory language that recusal is mandated whenever a judge's "impartiality *might reasonably be* questioned." 28 U.S.C. § 455(a). If there is any relevant distinction between these two standards, it would certainly escape an objective reasonable lay person. "[P]ublic confidence in the integrity of the judicial process," *Liljeberg,* 486 U.S. at 860, is understandably and properly shaken when a court purports to draw such a hypertechnical semantic distinction in this sensitive area. On its face, the statute, by its use of the term "might", clearly does not require *every* reasonable person to come to the same conclusion. Rather, if, as the Ninth Circuit concluded here, *some* "reasonable minds" might question Judge Ideman's impartiality, then it is inescapable that his "impartiality might reasonably be questioned," 28 U.S.C. § 455(a), and recusal is mandated. *Liljeberg*, 486 U.S. at 861.

The Ninth Circuit avoided this statutorily-mandated result here by imposing a requirement that the district court's decision cannot be disturbed unless it is "clearly erroneous." This idiosyncratic demand, not found in any other circuit, derives from earlier mandamus cases in which the Ninth Circuit developed the convoluted theory that a petition would be granted only when the district court's decision was not "clearly erroneous as a matter of law," *Bauman, supra,* 557 F.2d at 654-55; *Cement Antitrust,* 688 F.2d at 1305, a standard which the court admitted "is elusive at best." *Id.*[20/] The court below, in its reliance upon *Cement Antitrust* and

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[20/] To further complicate matters, the court attempted to explicate its unique "clearly erroneous as a matter of law" test by importing the test for determining when a finding of fact is clearly erroneous. *Cement Antitrust,* 688 F.2d at 1305.

Bauman, thus determined that the district court's findings were not clearly erroneous as *a matter of law*.[21/]

What is lost in the Ninth Circuit's legalistic approach to the recusal issue is "[t]he very purpose of § 455(a), [which] is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg*, 486 U.S. at 865. No reasonable lay observer (let alone most attorneys or judges) can be expected to follow the Ninth Circuit's tortuous reasoning here, in which it found that Judge Ideman's impartiality might be questioned by "reasonable minds," but the moving party must nevertheless proceed to trial before that apparently partial judge because an insurmountable and "elusive at best" "clearly erroneous as a matter of law" standard is applied when the issue is raised by mandamus, although the court has acknowledged that the movant might well (indeed, should) prevail on a post-judgment appeal of this issue after being forced to undergo three lengthy, extremely costly trials. Neither Congress nor this Court could have contemplated such a bizarre result. If mandamus review is to be permitted, as petitioners have urged, and as every other court has agreed, Point I, *infra*, then public confidence in the appearance of impartiality can only be preserved if the courts adhere to the statutory language, *i.e.*, if the judge's impartiality might reasonably be questioned, he should be recused. *Liljeberg*, 486 U.S. at 861.

This petition should be granted so that this Court may conform the Ninth Circuit's idiosyncratic, insurmountable,

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[21/] This conclusion is further emphasized by the fact that the key issues here are whether the district court erred as a matter of law in holding that the framed cover of *Time* hanging in Judge Ideman's chambers is legally irrelevant under § 455(a) (9a), and on whether a § 455(a) recusal motion requires evidence "sufficient to support a conclusion that [a judge] does" "ha[ve] some bias" (12a), rather than that his "impartiality might reasonably be questioned", 28 U.S.C. § 455(a).

"elusive at best" "clearly erroneous" standard to the correct view that when the statutory standard is met, recusal is required under § 455(a), whether review is by mandamus or by direct appeal.

III. RECUSAL IS CLEARLY MANDATED UNDER THE CORRECT LEGAL STANDARD

Under this Court's standard in *Liljeberg*, *supra* (or even under the Ninth Circuit's "clearly erroneous as a matter of law" test), recusal is clearly mandated in this case. The undisputed presence of the framed *Time* magazine cover on the wall of Judge Ideman's chambers alone would lead any reasonable person to question Judge Ideman's impartiality. In conjunction with the other evidence, the conclusion that Judge Ideman's impartiality might reasonably be questioned is inescapable. The district court reached a contrary result because it applied incorrect legal standards in which it required evidence sufficient to show actual bias by the presiding judge, which bias had to be preexisting and extrajudicial, and it looked not to the views of a reasonable person, but to Judge Ideman's state of mind.

It is difficult to imagine that a United States district court judge who is sitting on three major cases involving various churches of the Scientology religion would permit a framed copy of the May 6, 1991, *Time* magazine cover to hang in his chambers, particularly given that the accompanying article takes sides on key issues in the cases before him. It is even more difficult to imagine, however, that another judge could find this fact irrelevant as a matter of law. As Judge Letts made no fact findings as to the impact of the framed cover on a reasonable person, no deference is due his legal determinations, which are, in any event, clearly incorrect and an abuse of whatever discretion he may have.

The district court simply ignored the correct legal standard, which is how the framed cover hanging in Judge Ideman's chambers would appear to an objective reasonable

person. As this Court has stated, "it is critically important [under § 455(a)] to identify the facts that might reasonably cause an objective observer to question [the judge's] impartiality." *Liljeberg*, 486 U.S. at 865. The relevant facts include: 1) Judge Ideman sits on four major cases involving various Churches of Scientology; 2) the cover speaks for itself, pronouncing "SCIENTOLOGY: The Cult of Greed"; 3) any reasonable person would believe (correctly) that a judge controls and is responsible for his chambers, and is aware of what hangs on the walls;[22/] 4) any reasonable person would conclude that the Judge and his law clerks would be aware of the contents of the accompanying article; 5) any reasonable person would further conclude that both the cover and the article (whether its contents are true or false) constituted an extremely strong attack on Scientology, directly supported the Aznarans' position on key issues in their litigation, and mocked Scientology's status as a religion; and 6) the decision to frame and to hang a magazine cover takes some conscious effort.

Petitioners submit that these facts, standing alone, would lead any "objective observer to question Judge [Ideman's] impartiality." *Liljeberg*, 486 U.S. at 865. No reasonable person would find these facts to be irrelevant. That Judge Letts reached a different result is not because he is "unreasonable", but because he applied an incorrect legal standard, in which he focused on Judge Ideman's subjective state of mind (11a, 15a-16a) and demanded evidence sufficient to

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[22/] Even if Judge Ideman was in fact unaware of the framed, mounted cover in his chambers (which is inherently incredible), that fact would be irrelevant; "advancement of the purpose of [§ 455(a)] -- to promote public confidence in the integrity of the judicial process . . . -- does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." *Liljeberg*, 486 U.S. at 859-60.

show actual bias by the court (12a).[23/] No deference is due Judge Letts' conclusion regarding the *Time* cover.

The additional facts in the recusal motions, whether sufficient standing alone, reinforce the inescapable conclusion that Judge Ideman's and Special Master Kolts' impartiality might reasonably be questioned. Thus, no reasonable person would believe that Judge Ideman would be "very upset" by Mr. Fagelbaum's letter merely because of the alleged minor delays in the receipt of the transcripts, or that the matter of the delays alone prompted Judge Ideman to make the "only" phone call he has made to the Special Master in three years. Given that the Special Master claims he informed Judge Ideman that the only problem was delay, yet persisted in his unsubstantiated attacks on the integrity of the court reporters and the reporting service merely because the owners are Scientologists, would lead a reasonable person to conclude that Judge Ideman, too, raised questions about the integrity of the reporting service based on the religious affiliation of its owners. Again, this logical inference would lead any reasonable person to question Judge Ideman's and Special Master Kolts' impartiality, as it is no different than if they had questioned the veracity and integrity of a court reporting service owned by a Jewish person who had made financial contributions to his religion, in, for example, a defamation action between an anti-Semitic Holocaust revisionist historian and B'nai B'rith.

Indeed, Judge Letts did not conclude otherwise. Rather, he stated, "I cannot conclude that the evidence is a pre-existing bias or any other bias that arises from outside the

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[23/] Judge Lett's misapprehension of the correct legal standards is exemplified by his reliance upon *United States* v. *Grinnell Corp.*, 384 U.S. 563, 582-83 (1966), a case which involved claims of actual bias and prejudice. *See 12a, 16a.*

proceeding" (14a). This standard, however, is irrelevant under section 455(a), in which the inquiry is not one of actual bias, but whether "the facts . . . might reasonably cause an objective observer to question [the judge's] impartiality." *Liljeberg*, 486 U.S. at 865. Moreover, the very nature of this objective inquiry into the appearance of partiality renders irrelevant whether the bias is preexisting or extrajudicial. *See, e.g., Chantal, supra*, 902 F.2d at 1022-24.

Assuming that some reasonable person would still be wavering at this point, the fact that: 1) Judge Ideman (who has the *Time* cover hanging in his chambers and has questioned the integrity of a court reporting service because its owner is a Scientologist) has excoriated the Church and its counsel for "blatant disregard" of his orders when it is "largely undisputed . . . that the blatant disregard of the Court's order was not attributable to it" (13a); and 2) Judge Ideman's friend and former colleague is a defendant in one of the cases before him, would eliminate any possible remaining doubts in a reasonable person that Judge Ideman's "impartiality might reasonably be questioned," and his recusal is therefore mandated pursuant to 28 U.S.C. § 455(a).

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Dated: February 25, 1992 Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-70659
D.C. No. CV-88-1786-JMI
(Central California)
January 30, 1992

CHURCH OF SCIENTOLOGY INTERNATIONAL, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

and

VICKI J. AZNARAN, *et al.*,
Real Parties
In Interest.

Before:

FARRIS, POOLE AND NORRIS,
Circuit Judges

ORDER

The petition for rehearing and suggestion for en banc review are denied. No further filings will be accepted in this closed docket number.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-70659
D.C. No. CV-88-1786-JMI
(Central California)
December 4, 1991

CHURCH OF SCIENTOLOGY INTERNATIONAL, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

and

VICKI J. AZNARAN, *et al.*,
Real Parties
In Interest.

Before:

FARRIS, POOLE AND NORRIS,
Circuit Judges

ORDER

While reasonable minds might draw different inferences from the facts alleged in the motion for refusal, the court finds that the district court's order denying refusal was not

clearly erroneous, and further that the harm alleged in the petition is correctable on appeal. *See Bauman* v. *United States Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977); *In re Cement Antitrust Litigation (MDL 296)*, 699 F.2d 1297, 1302 (9th Cir. 1982). Accordingly, the petition for writ of mandamus is denied. The motion to stay is denied as moot.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 88-1786 JMI
November 22, 1991

VICKI J. AZNARAN AND RICHARD N. AZNARAN,
Plaintiffs,

v.

CHURCH OF SCIENTOLOGY OF CALIFORNIA, *et al.*,
Defendants.

ORDER DENYING MOTION TO RECUSE THE HONORABLE JUDGE JAMES M. IDEMAN

The Motion of defendants CHURCH OF SCIENTOLOGY OF CALIFORNIA, et al., to recuse the Honorable Judge James M. Ideman came on for hearing regularly on October 25, 1991.

Having reviewed the papers filed in connection with this matter, having heard oral argument, and being fully apprised of the relevant facts and law,

IT IS HEREBY ORDERED that the Motion of defendants CHURCH OF SCIENTOLOGY OF CALIFORNIA, et al., is DENIED.

IT IS SO ORDERED.

DATED: November 22, 1991

J. Spencer Letts
United States
District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE J. SPENCER LETTS, PRESIDING
UNITED STATES DISTRICT COURT JUDGE

CHURCH OF SCIENTOLOGY, ETC., *et al.*,
Plaintiffs,

vs.

UNITED STATES OF AMERICA, ETC., *et al.*,
Defendants.

CV-90-2042-JMI

TRANSCRIPT OF PROCEEDINGS

Friday, October 25, 1991

Los Angeles, California

Motion to Recuse Judge Ideman

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* * *

Los Angeles, California, Friday,
October 25, 1991; 2:10 o'clock p.m.

THE CLERK: CV-90-2042-JMI, Church of Scientology versus United States of America; CV-85-711-JMI, Religious

Technology Center versus Robin Scott; CV-85-7197-JMI, Religious Technology Center versus Larry Wollersheim et al.; and CV-88-1786-JMI, Vicki Aznaran versus Church of Scientology, et al.

* * *

MR. COOLEY: Well, I'd like to address that *Time* magazine article, Your Honor, because I think it's crucial.

THE COURT: No, it's not.

MR. COOLEY: And I think in and of itself, it mandates --

THE COURT: Sir?

MR. COOLEY: -- recusal.

THE COURT: I'm sorry.

* * *

THE COURT: You don't know, and I don't know, who hung that picture, why they hung it, or what it meant. It's a picture of a cover of a magazine.

I don't know why it is there, but you may not draw inferences about me from anything you can find sitting in my chambers.

MR. COOLEY: I respectfully submit that simply is not so.

THE COURT: But that is going to be a matter that is going to be up to the judge, and I don't agree with you, so I don't want to hear what's in the article.

The article is not pasted on his wall. The *Time* magazine cover is someplace in his chambers, I take it. My suspicion is that if it were in his office, you would have told me that, so I suspect it's not there.

* * *

THE COURT: I would assume, because it's so easily checked, that it must be true; if it isn't true, it occurs to me the defendants would probably find out it's not true and tell me that.

Without being difficult about it, different things capture different people's opinions, and people have things they like, things that tickle their sense of humor. There are a lot of reasons why people wear the things they wear, display the things they display.

I just simply think it's inappropriate to draw inferences about any individual who works in those chambers because there is something hanging on the wall in those chambers that I don't know how they got there. I can't get there from here, but if I thought it was relevant, I would think it was appropriate to consider it.

* * *

The *Time* magazine thing, while I rather thought that the defendants might want to address it, it didn't seem then and doesn't seem now anything you can draw any inferences from.

* * *

What I have said consistently -- and I haven't asked you, and there seems to be a high degree of desire to say on the record things about that article, and I don't choose to hear them.

What I have said is that a picture hanging on a wall that nobody has described for me what wall it's on, who put it there, why it's there, or any of those things, I don't think you can draw any inference from the existence of that picture because people do things for different reasons.

In my judgment it would be entirely inappropriate to draw the inference, any inference, from the mere existence of a *Time* magazine cover in a frame on any wall anywhere. It's not enough to draw an inference from. And I don't care what the underlying article said.

* * *

THE COURT: I've heard that argument, you've made that argument. I would respond -- and this is as far as I'm going to go to this -- that case has generated a lot of paper, it's caused Judge Ideman and his staff to do a lot of work, it is a case that is known to exist -- *Time* magazine is a widely circulated, well known publication -- a case that has generated, I presume, a lot of attention and a lot of work in that office, made its way to the cover of *Time* magazine, and somebody undertook to take that cover and put it on the wall.

There is no question that that cover displays some notoriety. It doesn't, in my judgment, display any attitude in and of itself of anybody who put it there.

Time magazine has independent significance. This lawsuit in that chambers, if it doesn't occupy a lot of attention, I'd be surprised.

I don't think you can infer from *Time* magazine, which is independent, as I said, its portrayal of whatever it was chosen to portray, I don't think you can take that as evidence of any state of mind for anybody that chose to hang it there. I simply don't believe that, so I don't credit it for that.

* * *

THE COURT: I understand the point, and I don't think so, because these cases have been before Judge Ideman for a long time, and there is the corresponding consideration that if it is true that what the Church of Scientology doesn't like about Judge Ideman is that reaction to the evidence that they've put before him, and that's why they want a different judge, the appearance of impropriety to the other people of allowing a change at this late stage is at least as high.

The law is clear that it has to be evidence and reason for bias that pre-exists the case itself, it cannot be things that come out of the case itself.

With a case that's gone on for a long time, there is always reason to ask the question if the real reason, if people want a change of judge, isn't because they have some inkling about what the judge thinks about what he's already seen about the case.

That is not an appropriate basis for refusal.

* * *

THE COURT: I understand your position, and I'm now finished hearing argument. I will, before I address the decision, say again what I just said.

After a case has gone on for a long time, then the appearance of impropriety of permitting a judge to be replaced, if there is insufficient objective reason for it, is a greater appearance of impropriety than refusing to have him replaced.

We are left with the issue, is the objective reason that you've asserted for believing that he has some bias sufficient to support a conclusion that he does.

* * *

THE COURT: *Time* magazine is an entity, it's a magazine with a large circulation. It has independent significance that has nothing to do with this lawsuit. That's what I said.

* * *

THE COURT: You will now having a ruling.

As I've indicated, the law is clear, the bias must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. That is the holding in the case of *United States versus Grinnell*. That is the issue to be decided.

The things in the case of Aznaran versus the Church of Scientology, as I understand the allegation, the thing that is thought to demonstrate the bias is that Judge Ideman accused

both parties of flagrant misconduct, blatant disregard of the Court's orders and outrageous litigation tactics.

The Church of Scientology, as I understand it, largely undisputed, says that the blatant disregard of the Court's order was not attributable to it.

The flagrant misconduct, that's sort of an undefined phrase, and outrageous litigation tactics is an undefined phrase, too.

To the extent that the blatant disregard of the Court's order was confined to the other party, the problem, as I see it, is simply in the use of the conjunctive "and."

The conclusion drawn that the barrage of paper and the barrage of orders that he drew, to call it outrageous litigation tactics and/or flagrant misconduct, even if this Court were to disagree with those conclusions, which I am not saying I do, I'm simply saying, if I did disagree with those conclusions, they would not, in my judgment, show any bias that results from anything but the judicial process.

I don't know whether that sort of thing that has happened at this hearing has happened in Judge Ideman's court. It has not been alleged, but I would have considered it flagrant misconduct.

I don't know whether I would call it outrageous litigation tactics or not, but I cannot say that it is possible, based on the record before me, to conclude that his statements that both parties had engaged in flagrant misconduct, blatant disregard or outrageous litigation tactics represent a pre-existing bias that didn't result from the judicial process. I would deny the motion in that case.

I'm considering them altogether, so I would put them altogether.

The next one is Religious Technology Center versus Robin Scott. There, as I understand the issue, Special Master Kolts, who had not received a transcript from a June 19 hearing, noted that fact and said that he had learned that the reporter and her husband were major financial contributors to Scientology, and that he had a doubt on the verification of disinterest.

In my judgment, the subsequent conduct by Judge Ideman did not accept at face value that there was a problem, he simply left the question open and said that it did require looking into.

I don't disagree with that conclusion. That is a conclusion again that he drew in the course of the litigation based on what he had seen of the entire litigation and the particular fact, and having said no more than, so far as I can tell from the record, that it should be looked into, I cannot conclude that the evidence is a pre-existing bias or any other bias that arises from outside the proceeding. I would therefore deny the motion to recuse in all cases based on those two sets of factors.

The third one is Church of Scientology of California versus United States, Sandra Baker. I must say, I'm not awfully persuaded by the government's argument in that case, but since the Scientology position is basically a mirror of the other two positions, without the other two, this one must fall, and I'm not persuaded by the other ones, so I would deny the motion to recuse in that case.

I think I have spoken at more than sufficient length about the *Time* magazine thing. I don't choose to dignify this proceeding with anything that's in the article. The article is what it is. Whether it is true on its own terms or whether it's not true on its own terms, I don't care.

I haven't read that article, and while I did read the characterizations of that article that were made by the Church of Scientology in this proceeding, I didn't really pay a lot of attention to the opposition to it, so that what I know about that article is what the Church has told me about that article.

The reason for that is because as I have said, in my judgment, the case in Judge Ideman's Chambers I would expect to be considered a major case.

If the subject of a major case in a judge's chambers appears on the cover of *Time* magazine, I simply don't think anybody can draw any inferences that there is some extra-judicial bias from the fact that that is there, and I don't make that inference.

And it's not in my chambers, and I don't think you could draw that inference if it were in my chambers. I don't think there is any inference that you could draw from that.

And that is an article that I did not read. Although I did read it for purposes of considering this motion, I don't think it's content can fairly be ascribed as being a reflection of the state of mind about this party just because that cover is someplace in Judge Ideman's Chambers.

I don't know how it got there, I don't know who put it there. I don't know that it's there, but I am accepting as true for the purpose of this ruling that it is there at this very

minute. I don't know that it is, nobody said that; it may not be.

I am assuming that it was there for purpose of decision. I'm assuming that it is there, and I still don't think you can draw any inference from that fact as to Judge Ideman's state of mind or the state of mind of anybody in his chambers.

That is a ruling, and unless there is something further --

* * *

THE COURT: And then I was even more troubled at what appeared to be a very conscious and strong attempt to force discussion of that article into this proceeding.

If it is true that there is nothing new here -- and that I haven't analyzed it -- if it is true that there is nothing new here but that *Time* magazine article, then I think the question of sanctions has to be considered with care.

* * *

THE COURT: If I reconsider, I'll give you another opportunity to reargue. Right now I'm not going [to] do sanctions. I'll look at it again. If I reconsider, we'll have to have further opportunity to argue.

I'm going to say this -- and the record will reflect it -- in my judgment, by the *Grinnell* standard -- the Supreme Court of the United States -- this was a very, very weak motion.

Were it to be done a third time, I would expect sanctions to be issued because I am very doubtful that this motion should have been filed at all.

The *Time* magazine thing, I really don't think people ought to differ about its significance, but this was filed long before, as you put it, you knew about that.

The other grounds are very, very weak, very weak, and were another such motion ever to be filed with no stronger grounds than those, if it got to me, I know I would sanction for it, but that hasn't happened yet.

* * *

THE COURT: Anything else for today; if not, we'll be in recess.

BEST AVAILABLE COPY

SUNUNU: Headed for a Fall?

TIME

SCIENTOLOGY

THE CULT OF GREED

HOW THE GROWING DIANETICS EMPIRE SQUEEZES MILLIONS FROM BELIEVERS WORLDWIDE

